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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. LAWRENCE DAVILA, Defendant and Appellant.	B206585 (Los Angeles County Super. Ct. No. PA056321)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles L. Peven, Judge. Modified and affirmed.

Derek K. Kowata, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Jaime L. Fuster and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

Lawrence Davila (appellant) appeals from the judgment imposed following his conviction by jury of second degree murder (Pen. Code, § 187), with a finding that he used a deadly weapon, here a knife (Pen. Code, § 12022, subd. (b)(1)). He was sentenced to a term of 16 years to life. Appellant principally contends it was error to admit evidence about the victim's briefcase because it was irrelevant and prejudicial. Appellant also contends, and respondent agrees, that he should have been awarded an additional day of credit for presentence custody. We will modify the judgment to include the further credit. Because we find that it was not error to admit the evidence about the victim's briefcase, we affirm the judgment as modified.

FACTS

At about 10:00 p.m. on June 24, 2006, the victim, David Deamorelli, a University of California at Santa Barbara student, arrived at his mother's home in Granada Hills. Deamorelli, five feet, 10 inches tall and weighing about 130 pounds, owned a laptop computer, which he kept in a briefcase and, according to his mother, took with him everywhere.

Deamorelli soon went out for the evening. He telephoned his friend Chris Stern at about 11:30. Stern testified that Deamorelli intended to spend the night at his house, as he usually did when in from college, after visiting at the house of another friend, on Kingsbury Street.

Near 12:30 a.m. on June 25, 2006, Richard Dominguez was driving behind Granada Hills High School. Just before reaching Kingsbury Street, he saw the victim walking in the middle of the street. He was slumped over, dragged his feet, and clutched both hands over his chest. When Dominguez drove up to the victim, he put his hands on the car hood and vomited blood onto the car. He then came to the car window and said that he had been stabbed.

Dominguez said he would call 911, and as they waited for response, he sat on the curb with Deamorelli. Deamorelli appeared to have lost consciousness. When paramedics arrived about eight minutes later, Deamorelli had already passed away.

Los Angeles Police Detective John Doerbecker arrived at the secured crime scene at about 2:00 a.m., June 25. He observed four holes in the victim's left chest, one in the back of the left arm, and one in the back. The victim had no weapons on his person. Police did not recover his briefcase.

Detective Doerbecker proceeded to locate the victim's car, on Kingsbury. Its driver's door was closed but ajar. Numerous blood drops were on the car and adjacent to it. Further drops appeared between the vehicle and where Deamorelli's body was located. But there was a higher concentration near the vehicle, and the detective concluded that the stabbing had occurred there.

A deputy county medical examiner described the location and depth of the victim's six wounds, and appraised three of them as not fatal, two as potentially fatal, and one, which was three to four inches deep, and had penetrated the left lung, as fatal. Deamorelli had marijuana in his system, and his blood alcohol was 0.07.

Brandon Yazgulian was the first of appellant's friends to testify about his doings contemporaneous with the murder. After midnight on June 25, 2006, Yazgulian was driving near Granada Hills High School, where he was to pick up appellant. He saw appellant talking with Deamorelli, who appeared friendly. After parking, Yazgulian went over to the two, who greeted him. He saw a hard-shell briefcase on top of Deamorelli's car.

Yazgulian returned to his car, and appellant arrived there within a few seconds. Appellant "jumped in" and said, "Let's go." He was nervous, jittery, and incoherent, and he rolled his shirt as if to hold something. As Yazgulian drove away, it appeared to him that the briefcase had moved to "the floor." After a few minutes, appellant made a cell phone call, in which Yazgulian heard him say he had stabbed someone. Appellant was crying during the call. He told Yazgulian he had had a confrontation with someone.

The two drove to a parking lot off Balboa Boulevard, which included a McDonald's, and met some friends. There, appellant acted strangely, yelling and running around, and telling his friends to get away from him. Yazgulian did not hear appellant say to anyone that someone had threatened or tried to attack him.

On cross-examination, Yazgulian characterized appellant as his friend and as a relaxed, peaceful person, who did not pursue trouble or, to his knowledge, carry a weapon. Yazgulian was aware that on the night of the crime, appellant had had an altercation with his stepfather, who was an intimidating, "scary" person. Yazgulian stated that when he approached appellant and the victim, appellant had appeared quiet, "kind of out of it," and "kind of like worried."

Bailey Johnson, appellant's close friend, whom he called his "sister," testified that at about 12:30 a.m. on June 25, 2006, appellant phoned her, crying and hysterical. He told her that he had stabbed someone, and that he did not know why. Johnson then met up with appellant and other friends at the parking lot. Appellant seemed drunk, and was crying and pushing everyone away. Johnson did not hear him say anything about being threatened or attacked, or about self-defense. Appellant, who usually wore glasses, was not wearing either them or contact lenses. Johnson was aware that appellant was bipolar, or manic-depressive.

Johnson stated that later that night, at appellant's house, he was drunk, and threw up. Johnson herself was using crystal methamphetamine, which could have affected her subsequent ability to remember. Appellant told Johnson he had had a fight with his stepfather, who Johnson testified was scary and intimidating, and had gotten drunk after that. He told Johnson that he had been walking past the victim when the victim, jingling something in his pocket, had said, "You know, it's funny, you never know what day is going to be your last." They had argued about the comment. Appellant said he had felt threatened, but did not mention Deamorelli's having a weapon. Johnson admitted a recent a conviction for receiving stolen property.

Police interviewed several of the foregoing witnesses, as well as appellant. During his first interview, Yazgulian told them that when he approached appellant and the victim, the latter's hands were in his pockets. Yazgulian initially failed to mention appellant's admission of stabbing someone. Yazgulian testified that he did this because he was "freaked out," and also was concerned that to report it might somehow incriminate him.

Police arrested appellant on July 27, 2006. At that time, he stood five feet seven inches and weighed about 195. With appellant's consent, Detective Doerbecker and Detective Terry Keyzer searched his home, with his mother and stepfather present. In a drawer in appellant's bedroom, the detectives found what appeared to be a broken off folding knife. The detectives interviewed appellant, and he stated he had discarded the knife used in the stabbing in the McDonald's parking lot.

The tape recording of appellant's interview was played in open court. The jurors were provided a transcript, which is in the record on appeal. After advisement and waiver of his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436), appellant told the detectives that on the night of June 24, 2006, he had had an argument with his stepfather and had left home and gone to his sister's house, adjacent to Granada Hills High. She was not home, so he began walking. He had had a little to drink. The victim drew his attention, and they spoke. The victim acted very threateningly: hands in pockets, he fidgeted, and said "Wouldn't it be f___ed up, if you didn't make it to see tomorrow? What would it be like if your family knew you weren't going to make it?"

According to appellant, Deamorelli tried to stab him, and he protected himself, by wrestling and stabbing Deamorelli. Appellant said that Deamorelli fidgeted in his pocket throughout their conversation, and then "kept, like going like this towards me," and took a knife out of his pocket and tried to stab appellant. As they wrestled, appellant said, he grabbed Deamorelli's arms. One hand twisted, and the knife went into Deamorelli's chest. Appellant could not say how many times it did so. He claimed he then pushed off Deamorelli and ran to Yazgulian's car, while Deamorelli ran away. Appellant stated that the knife had been slapped into Deamorelli repeatedly, as appellant pushed the latter's hand away from himself. When the detectives told him his story was incredible, appellant replied, "I fought with the guy. Whatever happened he got hurt, you know? And then that's – what am –what am I supposed to do."

Told to tell a credible story, appellant next said Deamorelli came at him, they scuffled, he got the knife away from Deamorelli and stabbed him in self-defense. He did not remember how many times, as he was "a little buzzed," and scared. After several

denials, appellant stated he put the knife in his shirt, then took it off and discarded it. Because he was drunk and blacking out, he did not remember where he did that. He then said he had earlier drunk a miniature of vodka, all at once.

Detective Keyzer questioned this account, and appellant repeated Deamorelli's supposed threat, about not making it to tomorrow. He said they then scuffled; Doerbecker said that would produce marks that were not there, and appellant said he grabbed the knife from Deamorelli, who was not gripping it tightly. When the detectives said that would not have been threatening, appellant said Deamorelli lunged at him. Appellant stated he took the knife by the handle, and turned it. He could not say what type the knife was.

Detective Keyzer asked why appellant had not told the police that he had had to defend himself, and appellant could only say he was scared. The detectives then told appellant they knew it was his knife, and suggested that appellant thought Deamorelli was about to pull out something like a gun, so appellant stabbed him. Appellant agreed, saying he had thought Deamorelli had a gun and he panicked. He reiterated that Deamorelli had been very threatening, verbally. He had called to appellant, who had gone over to see what he wanted. They conversed; appellant still could not recall the topic, but said it was not computers. Then Deamorelli threatened, and appellant thought Deamorelli had a gun in his pocket, based on his motions there, including gripping. Growing up in Canoga Park, appellant said, he had had guns "pulled on" him over a dozen times. Only a knife or gun would make the kind of click he heard.

Appellant had carried the knife –he did not remember what kind – because of his argument with his larger stepfather, and because he was drunk. He then said it was an ordinary kitchen knife, which he kept beneath his bed, because "I'm a paranoid person." Appellant said he was bipolar, but had not taken medication for a few years.

Appellant next said Deamorelli had called to him while standing by the front tire of his car. When they conversed, Deamorelli leaned against his car "like he was drunk too." Then he said the threatening words, which stuck in appellant's mind. In addition to the click in the pocket, Deamorelli moved toward appellant with his shoulder, with his

hand still in his pocket. Appellant then stabbed Deamorelli in the chest, with the right hand. Appellant meant to strike the arm, to prevent Deamorelli from extracting his gun, but the victim moved. He moved as if to take something from the pocket, and appellant stabbed him again, several times. He then turned and ran, to Yazgulian's car.

Appellant said he thought the victim had a briefcase on the hood or top of his car. Appellant stated that he did not take it. He claimed he told Yazgulian in the car that a guy tried to come at him, and he stabbed him. Recounting what he told Johnson on the phone, appellant said: ". . . I said I got into altercation. I got into it with somebody. That's normally what I say." He added that he did not tell Johnson he had stabbed someone, but said "I got into some sh_t. That's normally what I say when I get into a fight." He then said he had told Johnson that he stabbed someone.

Appellant stated he had worn a black T-shirt, but had discarded it with the knife, then had gotten a red T-shirt. He threw the shorts he was wearing in a dumpster at home; they were not bloodstained, but he was scared. Appellant claimed he had no blood on his hands or arms after the stabbing. When he had been jumped on the past, he'd gotten his "ass whopped." Asked to describe the knife further, appellant recalled a long one.

Detective Doerbecker asked whether appellant had taken the briefcase the victim had with him. Appellant insistently replied he had not. Appellant stated that Deamorelli had made just one more similar threatening comment. Appellant reiterated that he never saw a weapon in Deamorelli's hand, but only saw his hand in his pocket. With the other hand he wagged a finger, as he spoke. What Deamorelli said made appellant think he had a gun, and he got scared. He now admitted that he had two vodka miniatures and two Vicodins after the fight with his stepfather. At the conclusion of the interview, appellant repeatedly exclaimed, "That's what I get for protecting myself."

In appellant's defense, his older brother, Gilbert Carbajal, testified that appellant was meek and not aggressive, adding that he had been bullied many times. Appellant had been diagnosed as bipolar, manic-depressive, and had taken medication for it. Carbajal's wife, Danielle, testified she had known appellant for 11 years, and he had lived with her and her husband as a teenager. His temperament was mellow, and he was not aggressive.

DISCUSSION

At the beginning of trial, appellant moved to exclude any mention of the briefcase, as irrelevant and unduly prejudicial under Evidence Code section 352. He admitted that Deamorelli's briefcase, on top of his car, was "part of the descriptive scene."Appellant argued that following his police interview, it had been shown that he had no connection with the item. The prosecutor responded that, coupled with the briefcase, the evidence that Deamorelli's car door had been ajar supported "the issue of potential robbery" as a motive. The court ruled that it would allow testimony about the briefcase's presence.

Immediately following, appellant moved to exclude any opinions by the police officers. He argued that interview questions implied that he had taken the briefcase. The prosecutor admitted that some questions might suggest the detectives suspected the murder "could have been a robbery gone bad." But he stated he would not argue that to the jury. He suggested that appellant indicate specific passages in the transcript to which he objected. The court said it would examine the transcript before the tape was played, and "We will make some rulings on it."

After reading the transcript, the court entertained appellant's objections. In response to the argument about the police's aggressively challenging appellant during their interview, the court noted appellant's shifting stories and that it regarded the interview as normal and typical. Appellant replied that his objection was to questions or statements by the officers indicating their belief about what happened. The court found them admissible, noting that appellant had been free to challenge the officers. Appellant then recited his further objections, for the record. Among them, appellant argued that the final questioning about the briefcase should be excluded as irrelevant and unduly prejudicial under Evidence Code section 352.

Appellant presently contends that all evidence about Deamorelli's briefcase or computer should have been excluded, because it was not relevant (Evid. Code, §§ 210, 350), and because its probative value was substantially outweighed by its substantial danger of undue prejudice (Evid. Code, § 352). Appellant further contends that the

admission of such evidence deprived him of due process and a fair trial. These contentions lack merit.

Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) The trial court possesses wide discretion in determining whether evidence is relevant (*People v. Scheid* (1997) 16 Cal.4th 1, 14), and we correspondingly review that determination for abuse of discretion. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1057-1058.)

Here as he did below, appellant agrees that evidence of the presence of Deamorelli's briefcase at the murder scene was relevant to show the layout of the crime scene. Appellant characterizes this relevance as marginal, but lack of strength does not render evidence irrelevant. (*People v. Freeman* (1994) 8 Cal.4th 450, 491.) Furthermore, the presence and car top location of the briefcase created an inference that the victim was preparing to leave, as opposed to standing by and calling out, and thus that appellant initiated the encounter. This inference also conflicted with appellant's claims that the victim seemed poised to attack him. Finally, the juxtaposition of the briefcase – which the victim uniformly kept with him – and the car further indicated that the stabbing had occurred there. In short, the evidence of the briefcase was relevant for reasons unrelated to any suspicion that appellant wanted to take it.

Appellant's second argument is that the evidence should have been excluded under Evidence Code section 352. Appellant repeats his characterization of the briefcase evidence as deficient in probative value, and he argues that it posed substantial prejudice, by way of allowing the prosecution to advance an unfounded theory of motive, namely a possible robbery attempt.

We review the trial court's exercise of the discretion under Evidence Code section 352 for abuse that is "arbitrary, capricious, or patently absurd . . . ." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) There was no such abuse here. First, the legitimate inferences we have enumerated above were at least as strong as the prejudicial one that appellant posits. For that reason alone, the court's weighing process cannot be faulted.

Second, the only significant articulation of the robbery inference that the jury heard was a fragment of closing argument in which the prosecutor effectively retracted the theory.[1] Neither this reference nor the underlying evidence posed such a danger of undue prejudice to appellant as to render admission of the briefcase evidence an abuse of discretion. Because we find no error in the trial court's evidentiary rulings, a fortiori, there was no due process violation.

Even if, arguendo, the trial court erred in admitting evidence about the briefcase, the error was harmless in light of the overwhelming evidence in support of the jury's verdict. Appellant's principal arguments at trial were self-defense and his peaceful character. The evidence adduced at trial was overwhelming in refutation of those arguments. As merely illustrative are (1) the number and depth of the stab wounds; (2) appellant's failure to tell those persons he met immediately after the stabbing that he acted in fear of the victim; (3) appellant's prevarication and shifting stories during his police interview; and (4) appellant's disposal of his clothes and the knife—which he first denied even having—after the incident. There thus is no reversible error given the record here even if admission of the briefcase evidence was erroneous, which we find it was not.

With respect to appellant's presentence credit for time served, appellant was arrested on July 27, 2006, and sentenced on November 6, 2007. At sentencing, the court

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[1] [The Prosecutor]: "Now, again, we don't know what went down at that car. We don't. You know. Could ask, for example. There was this briefcase supposedly it's on top of the car. It ends up somehow to the bottom, the floor. [¶] Could Mr. Davila have tried to take it away from him? [¶] [Defense counsel]: Objection; improper argument. [¶] THE COURT: Overruled. [¶] Ladies and Gentlemen, what [the prosecutor] is now telling you, simply his views of the evidence. You're the sole judges of what the evidence is in the case. [¶] Go ahead, Mr. Holtz. [¶] [The Prosecutor]: Thank you. [¶] We know that it moved somehow. Could it have moved because Mr. Deamorelli bumped into the car or something and it fell? Sure. It could also have moved because Mr. Davila tried to take it. I don't know. [¶] So because of that, listen, you can't convict him that, oh, beyond a reasonable doubt he tried to take the case. Absolutely not. I'm not saying that. [¶] I'm saying it's a potential theory. But that isn't the evidence. What the evidence is, this person's got six holes in him. And he wasn't acting in self-defense."

awarded 467 days credit. After the advisement of appellate rights, appellant's counsel told the court, "My calculatio[n] was 468 instead of 467." The court responded that it had counted 467 days. The parties now agree that 468 days is the accurate computation, and it is. We shall modify the judgment accordingly.

DISPOSITION

The judgment is modified by awarding 468 days of presentence custody credit, instead of 467. As modified, the judgment is affirmed. The superior court shall prepare and transmit to the Department of Corrections and Rehabilitation an amended abstract of judgment, reflecting the modification.

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BENDIX, J.*

We concur:

FLIER, Acting P. J.

BIGELOW, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.